

1 Petitioner's guilty plea, the State agreed to dismiss Counts 3 through 5 of the indictment, to
2 refrain from alleging Petitioner's prior felony conviction to enhance his sentence; to
3 recommend a sentence not to exceed 15 years; and to refrain from filing charges in an
4 unrelated aggravated assault case. (*Id.*)

5 On April 10, 2003, the Maricopa County Superior Court accepted Petitioner's guilty
6 plea. (Ex. D.) On June 13, 2003, the court sentenced Petitioner on Count 1 to an aggravated
7 sentence of 14 years' imprisonment, and on Count 2 to a presumptive sentence of 14 years'
8 imprisonment. The sentences were ordered to run concurrently. (Ex. E.) The trial court
9 found both counts to be dangerous, but non-repetitive. (*Id.*) The court gave Petitioner credit
10 for 297 days of presentence incarceration. (*Id.*) The trial court granted the State's motion
11 to dismiss Counts 3 through 5 of the indictment and the allegation of Petitioner's prior felony
12 conviction. (*Id.*)

13 **A. First Petition for Post-Conviction Relief**

14 On August 5, 2003, Petitioner filed his first notice of Post-Conviction Relief ("First
15 PCR") in the Maricopa County Superior Court. (Ex. F.) On September 24, 2003, Petitioner
16 filed a motion to dismiss his first Petition for Post-Conviction Relief. (Ex. G.) The Maricopa
17 County Superior Court dismissed Petitioner's First PCR petition on September 26, 2003.
18 (Ex. H.)

19 **B. Second Petition for Post-Conviction Relief**

20 Nearly a year after the dismissal of his First PCR petition, on September 20, 2004,
21 Petitioner filed a second notice of Post-Conviction Relief ("Second PCR") in the Maricopa
22 County Superior Court. (Ex. I.) Citing *Blakely v. Washington*, 542 U.S. 296 (2004), he
23 claimed the trial court unconstitutionally imposed the aggravated sentence because it used
24 findings that had not been determined by a jury beyond a reasonable doubt. (*Id.*) On
25 September 21, 2004, the day after the Second PCR was filed, the trial court dismissed the
26 petition after concluding that it was untimely filed and that *Blakely* did not apply
27 retroactively to Petitioner's convictions, which the court concluded became final after
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1 Petitioner did not appeal the September 26, 2003, dismissal based on Petitioner's motion to
2 dismiss. (Ex. J.) In his Petition for Writ of Habeas Corpus, Petitioner indicates that he
3 appealed the dismissal to the Arizona Court of Appeals, however, he did not attach anything
4 evidencing this assertion and Respondents indicate that they were unable to locate any
5 records reflecting an appeal was taken.

6 **C. Third Petition for Post-Conviction Relief**

7 On October 20, 2005, Petitioner filed a third untimely Notice of Post-Conviction
8 Relief ("Third PCR"). (Ex. K.) Petitioner again claimed that under *Blakely* he was entitled
9 to have a jury determine aggravating factors for his sentence. (*Id.*) Petitioner also added two
10 claims. He claimed that the State violated its plea agreement with him by alleging
11 aggravating factors at sentencing that encompassed his behavior in the dismissed counts from
12 his indictment, Counts 3 through 5. (*Id.*) He also claimed that the State violated the
13 agreement by alleging his prior felony conviction as an aggravating factor. (*Id.*) After noting
14 that the Third PCR was untimely filed, the trial court recognized that Petitioner had raised
15 the same *Blakely* claim in the Second PCR, and dismissed the Third PCR. (Ex. L.)

16 Petitioner then filed a petition for review in the Maricopa County Superior Court on
17 December 29, 2005, which was transmitted to the Arizona Court of Appeals, where it was
18 filed on January 3, 2006. (Ex. M.) On January 19, 2006, the Arizona court of Appeals
19 dismissed the petition as untimely, explaining:

20 A review of the record in this matter indicates that the
21 trial court dismissed the petition for post-conviction relief on
22 November 11, 2005, and the petition for review was not filed
23 until December 29, 2005. The petition for review was not filed
24 within 30 days of the trial court's final decision disposing of the
25 petition for post-conviction relief proceedings. See Rule
26 32.9(c), Ariz. R. Crim. P. A petitioner who seeks appellate
27 court review of the actions of the trial court must file a petition
28 within 30 days after the final decision of the trial court.
Whether petitioner was without fault for the untimely filing is a
question of fact. The trial court may, "after being presented
with proper evidence, allow a late filing" if it find that petitioner
was not responsible for the untimely filing. See *State v. Pope*,
130 Ariz. 253, 255, 635 P.2d 846, 848 (1981). Because the
petition in this matter was untimely, IT IS ORDERED
dismissing this matter.

1 (Ex. N.)

2 Subsequently, on September 14, 2006, Petitioner filed a Motion for Leave to File a
3 Late Petition for Review in the Maricopa County Superior Court. (Ex. O.) Petitioner
4 explained that, previous to incarceration, he had a limited understanding of the law and had
5 relied on his attorney to protect his rights. He claimed he was denied legal access because
6 the prison library had been closed for two weeks and was therefore not responsible for the
7 untimely filing. (*Id.*) The Superior Court denied the request after finding “[n]o good cause
8 appearing.” (Ex. P.)

9 On December 7, 2006, after the trial court denied his Motion for Leave to File a Late
10 Petition for Review, Petitioner filed a Motion to Accept Jurisdiction/Petition for Review in
11 the Arizona Court of Appeals. (Ex. Q.) On December 19, 2006, the Court of Appeals
12 dismissed Appellant’s Petition for Review as untimely. (Ex. R.)

13 **D. Fourth Petitioner for Post-Conviction Relief**

14 On January 19, 2007, Petitioner filed a fourth Notice of Post-Conviction Relief
15 (“Fourth PCR”), again claiming that his Sixth Amendment rights were violated “by the
16 imposition of an enhanced sentence of 14 years based on the sentencing judge’s
17 determination of the facts that was [sic] not found by a jury or admitted by the defendant.”
18 (Ex. S.) Petitioner further claimed the at “A.R.S. 13-702 is unconstitutional,” and that
19 aggravating his sentence under that statute was “unconstitutional and void, invalid, and nullity
20 [sic], as if it never happen [sic].” (*Id.*)

21 On January 31, 2007, the trial court dismissed Petitioner’s Fourth PCR as untimely,
22 stating:

23 Defendant again claims that his Sixth Amendment rights were
24 violated because the court rather than a jury determined the
25 aggravating factors used to aggravate his sentence. This is the
26 same *Blakely v. Washington*, 542 U.S. 296 (2004), claim that he
27 has raised twice before. The court denied that claim on
28 September 21, 2004, and again on November 10, 2005, finding
that *Blakely* did not apply retroactively to defendant because his
conviction was final before *Blakely* was decided.

(Ex. T.) Petitioner petitioned for review in the Arizona Court of Appeals, and the court

1 denied review on November 8, 2007. (Ex. U.) Petitioner then petitioned for review in the
 2 Arizona Supreme Court. (Ex. V.) The court, without comment, denied review on April 1,
 3 2008. (Ex. W.)

4 **E. The Pending 2254 Petition**

5 On May 2, 2008, Petitioner filed the instant habeas petition, which alleges the
 6 following bases for relief:

7 **Ground One:** Violation of Due Process Clause of the Fourteenth 8 Amendment [because:]

9 1. State violated plea agreement. Plea agreement stipulated that
 10 no prior felony would be alleged, but the judge used a prior
 11 felony to aggravate Petitioner's sentence.

12 2. Elements of charges dismissed pursuant to plea agreement
 13 were used as aggravating factors.

14 3. Petitioner's sentence exceeds that authorized by law.

15 **Ground Two:** Violation of Sixth Amendment right to have jury 16 decide aggravation factors [because:]

17 1. The judge abused his discretion in determining aggravation
 18 factors that were not proven beyond a reasonable doubt.

19 2. A jury was not formed to decide aggravation factors and no
 20 waiver of that right was signed by Petitioner.

21 3. Elements of charges dismissed pursuant to the plea
 22 agreement were used as aggravating factors during sentencing,
 23 denying Petitioner the right to have those elements proven
 24 beyond a reasonable doubt.

25 **Ground Three:** Violation of the Fifth Amendment right of 26 confrontation [because:]

27 1. Trial court's decision to aggravate Petitioner's sentence using
 28 untried allegations that were dismissed pursuant to plea
 agreement.

Petition, pp. 5-8.

29 **II. LEGAL DISCUSSION**

30 The Antiterrorism and Effective Death Penalty Act ("AEDPA") provides a one-year
 31 statute of limitation on state prisoners seeking federal habeas relief from their state
 32 convictions. *See Lott v. Mueller*, 304 F.3d 918, 920 (9th Cir. 2002). The statutory tolling

1 provisions of AEDPA provide that a petitioner is entitled to tolling of the statute of
2 limitations during the pendency of a “properly filed application for state post-conviction or
3 other collateral review with respect to the pertinent judgment or claim.” 28 U.S.C. §
4 2244(d)(2). *See also Harris v. Carter*, 515 F.3d 1051, 1053 (9th Cir. 2008).

5 Petitioner’s conviction and sentence became final on September 30, 2003, the date on
6 which the Maricopa County Superior Court, at Petitioner’s request, dismissed his First PCR.
7 Even if Petitioner illogically (because he voluntarily dismissed his First PCR) is credited with
8 an additional 30 days pursuant Rule 32.9(c), Ariz. R. Crim. P., for the filing of an appeal, his
9 conviction was final on October 30, 2003. Accordingly, the one-year state of limitations on
10 Petitioner’s federal habeas action expired at the latest on October 30, 2004, unless it was
11 subject to tolling by any pending action for state post-conviction relief. *See Bunney v.*
12 *Mitchell*, 262 F.3d 973, 974 (9th Cir. 2001).

13 Petitioner did not have any action for post-conviction relief pending in the state courts
14 from October 30, 2003, through September 20, 2004. As described above, however,
15 Petitioner did pursue three additional post-conviction relief proceedings after his First PCR
16 was dismissed. Petitioner filed his Second PCR on September 20, 2004, but the trial court
17 dismissed that petition the following day after concluding that it was untimely filed and that
18 *Blakely* did not apply retroactively to Petitioner’s convictions. (Ex. J.) Petitioner, who did
19 not file a reply to the Respondent’s answer, has not challenged either of the trial court’s
20 conclusions. More important, it is very doubtful he could.

21 When Petitioner filed his Second PCR, the time for filing a Rule 32 of-right
22 proceeding had long expired. *See* Rule 32.4(a), Ariz. R. Crim. P. (“notice must be filed
23 within ninety days after the entry of judgment and sentence . . .”). Additionally, reliance on
24 *Blakely* did nothing to revive his claims. As the state court concluded, the United States
25 Supreme Court has not made *Blakely* retroactive to cases on collateral review. *See Schardt*
26 *v. Payne*, 414 F.3d 1025, 1038 (9th Cir. 2005). *See also Tyler v. Cain*, 533 U.S. 656, 662
27 (2001) (a new rule is “made retroactive to cases on collateral review” only if the Supreme
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1 Court so holds). Accordingly, Petitioner's Second PCR was, as the state court found,
2 untimely and not subject to an exception to the States' timeliness requirements. Not being
3 properly filed, it did not serve to toll the statute of limitations for his federal habeas petition
4 and the time for doing so thus expired, at the latest, on October 30, 2004.

5 Petitioner filed his Third PCR petition on October 20, 2005, and his Fourth PCR
6 petition on January 19, 2007. However, like his Second PCR petition, the later petitions
7 were dismissed as untimely and raised *Blakely* claims that had already been addressed and
8 dismissed by the state court. Thus, those petitions did nothing to toll or revive the limitations
9 period as they were not "properly filed," *Pace v. DiGuglielmo*, 544 U.S. 408, 413 (2005), and
10 the untimeliness of the instant petition is unaffected.

11 **C. Equitable Tolling**

12 The Ninth Circuit has recognized that the AEDPA's statute of limitations is subject
13 to equitable tolling. *Roy v. Lampert*, 465 F.3d 964, 969 (9th Cir. 2006). Equitable tolling is
14 applicable only when "extraordinary circumstances beyond a prisoner's control make it
15 impossible to file a petition on time." *Calderon v. United States Dist. Court (Beeler)*, 128
16 F.3d 1283, 1288 (9th Cir. 1997), *overruled on other grounds by Calderon v. United States*
17 *Dist. Court (Kelly)*, 163 F.3d 530 (9th Cir. 1998) (*en banc*). Equitable tolling is justified in
18 few cases: "the threshold necessary to trigger equitable tolling [under the AEDPA] is very
19 high, lest the exceptions swallow the rule." *Miranda v. Castro*, 292 F.3d 1063, 1066 (9th Cir.
20 2002). Equitable tolling requires a petitioner to show that (1) he has pursued his rights
21 diligently, and (2) some extraordinary circumstance stood in his way. *Pace*, 544 U.S. at 418.
22 Petitioner carries the burden of showing this exclusion should apply to him. *Id.* Further, he
23 must prove the alleged extraordinary circumstance was the but-for and proximate cause of
24 his untimeliness. *Allen v. Lewis*, 255 F.3d 798, 800 (9th Cir. 2001).

25 Here, Petitioner did not challenge Respondent's assertion that his habeas petition was
26 not timely filed and also has not identified any potential basis of equitable tolling. The only
27 potential argument that can be found in the record is in Petitioner's Third PCR petition where
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1 he indicates that he did not have access to the library and therefore could not file his petition.
2 By that time, however, the limitations period for filing a federal habeas petition had long
3 since expired. As such, Petitioner is not entitled to statutory or equitable tolling and his
4 habeas petition must be dismissed because it is time-barred.

5 **III. RECOMMENDATION**

6 For all of the above reasons, **THE MAGISTRATE JUDGE RECOMMENDS** that
7 the District Court, after its independent review, **DISMISS WITH PREJUDICE** Petitioner's
8 Petition for Writ of Habeas Corpus filed May 2, 2008 [Docket No. 1].

9 This Recommendation is not an order that is immediately appealable to the Ninth
10 Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of
11 Appellate Procedure, should not be filed until entry of the District Court's judgment.

12 However, the parties shall have ten (10) days from the date of service of a copy of this
13 recommendation within which to file specific written objections with the District Court. *See*
14 28 U.S.C. § 636(b)(1) and Rules 72(b) and 6(a) of the Federal Rules of Civil Procedure.
15 Thereafter, the parties have ten (10) days within which to file a response to the objections.
16 If any objections are filed, this action should be designated case number: **CV 08-831-PHX-**
17 **DGC**. Failure to timely file objections to any factual or legal determination of the Magistrate
18 Judge may be considered a waiver of a party's right to *de novo* consideration of the issues.
19 *See United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (*en banc*).

20 DATED this 19th day of March, 2009.

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22 
23 Jacqueline Marshall
24 United States Magistrate Judge
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